BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER D. HARRIS	)	
Claimant	)	
	)	
VS.	)	
	)	
GOODYEAR TIRE & RUBBER CO.	)	
Respondent	)	Docket No. 1,015,923
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the May 12, 2004 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found the claimant suffered accidental injury arising out of and in the course of his employment with respondent. The order further authorized medical treatment.

The respondent requests review of whether the claimant suffered accidental injury arising out of and in the course of employment. Respondent argues that the onset of claimant's back pain occurred while he was walking in the plant. Consequently, respondent argues the accident, if any, was attributable to a personal condition and is not compensable. Respondent further argues claimant's description of the ankle injury incident was not credible and in any event the ankle injury did not require significant treatment until after claimant suffered a fall at home.

Claimant argues he injured his back performing his repetitive job duties lifting and turning while handling tires. Claimant further argues that he fell at work, injured his ankle and was taken to the emergency room for treatment. Consequently, the claimant argues he has met his burden of proof to establish that he suffered two compensable work-related injuries and requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On January 31, 2000, claimant began working as a tire builder for the respondent. His job duties included loading rolls of rubber with metal into a machine which makes tires. On February 10, 2004, claimant reported to work feeling fine but as he continued working noticed a gradual onset of back pain. At about 4:30 p.m. claimant's back began to hurt. He felt a couple of stabbing pains in his back and it continued to get progressively worse while he continued to work. Around 7:30 p.m. the claimant took a break and continued to have pain in his back. After the break the claimant notified his supervisor that his back was hurting and claimant was sent to the plant dispensary. Claimant was then referred to St. Francis' emergency room.

Claimant agreed that he never told his supervisor that he had an accident but claimant testified that he told his supervisor that his back had started hurting while he was working at the machine building tires. Claimant's supervisor, David L. Young, testified that claimant complained of back pain but said he did not have an accident. Mr. Young then sent claimant to the plant dispensary. Mr. Young further testified that he thought claimant said the back pain occurred from walking around.

The contemporaneous medical records from the emergency room at St. Francis Hospital reflect claimant suffered a work injury lifting tires at work. The Emergency Report noted in pertinent part:

> The patient is a 33-year-old male who complains of back pain. The patient denies any specific trauma but states that tonight at work he began having low back pain which has increased in intensity. The patient does a lot of lifting and turning in his work.[1]

X-rays were taken, claimant was diagnosed with a low back strain, medications prescribed and claimant was placed on light-duty work by the emergency room physician.

Claimant returned to work on February 11, 2004. Claimant was placed on light-duty work painting an office shared by supervisors. Although denied by claimant, it is alleged that he painted not only the walls but also the office equipment including the computer monitor, keyboard, telephone and printer as well as lockers and bulletin boards. When the paint job was discovered, the claimant was located in a break room upstairs although he had been instructed not to climb stairs. A meeting was held with claimant, managers and union representatives at which time it was determined claimant was acting strange as if

[1] P.H. Trans., Ex. 1.

under the influence of drugs or alcohol. Accordingly, claimant was directed to go to the plant dispensary and was accompanied by the manager of quality assurance, Allan L. Henderson.

Claimant testified that as he was walking to the dispensary he was instructed to walk on the "towveyor" (a chain in the floor used to pull wagons), caught his foot in a space in the floor and fell injuring his ankle. Mr. Henderson stated claimant was not directed to walk on the "towveyor", that there is not sufficient space in the floor to trip on and that claimant did not trip and fall. Instead, Mr. Henderson noted claimant bent down, placed his hand on the floor and rolled onto his buttocks.

Claimant was again taken to the plant dispensary. The report from the dispensary indicated claimant complained of back pain.[2] Claimant was referred to the emergency room at St. Francis Hospital. The St. Francis Hospital Emergency Department Record noted "his [claimant's] supervisor asked him to 'walk across a beam and I fell in a hole' hurting his back."[3]

Because of the painting incident the claimant was terminated from employment with respondent.

At his attorney's request, the claimant was examined by Dr. Edward J. Prostic. Dr. Prostic's report contains a history of injury which includes a description of the back problems from repetitious lifting and turning at work followed by the incident twisting his ankle. The report further detailed an ankle injury at home after claimant was terminated from work by respondent. The report notes: "He [claimant] had a subsequent injury at home walking down stairs when his ankle turned once again and required him to be seen again at the emergency department and then at Tall Grass Orthopedic where he was given an ankle stabilizing brace."[4] The treatment for claimant's ankle occurred after the injury at home.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of

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[2] P.H. Trans., Ex. B.

[3] Id.

[4] P.H. Trans., Ex. 2.

[5] K.S.A. 44-501(a) (Furse 2000).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

Initially, respondent argues that claimant failed to meet his burden of proof that he suffered a work-related back injury because claimant's supervisor testified that claimant denied he had an accident and instead the supervisor thought claimant stated that he hurt his back walking around. Respondent argues that such an injury would be a personal condition and not compensable.

Although the claimant agreed that he did not suffer an accident, he noted that he had a gradual onset of back pain which worsened as he continued working. The claimant testified that he told his supervisor that his back pain was the result of operating the tire building machine. The claimant attributed his back symptoms to his work building tires which required loading rubber mixed with metal from a roll into a machine. Claimant described the job as requiring repetitive lifting and turning. Claimant's supervisor agreed with that description of the job. And the contemporaneous emergency room records corroborate claimant's history of an onset of pain without specific trauma but noting that claimant does lifting and turning at work.

The Board finds claimant has met his burden of proof to establish that he suffered accidental injury to his back arising out of and in the course of his employment on February 10, 2004. Accordingly, the Board affirms the ALJ's Order regarding the February 10, 2004 accident.

On February 11, 2004, the claimant either tripped and fell or gradually slumped to the floor. But the contemporaneous records from the plant dispensary and the emergency room indicate that claimant's only complaint was back pain. It was not until after a fall claimant suffered at home when he was no longer employed by respondent that claimant sought emergency room treatment on February 29, 2004, for his right ankle.

Based upon the record compiled to date, the Board finds claimant has failed to meet his burden of proof that he suffered accidental injury to his right ankle arising out of and in the course of his employment with respondent. The evidence indicates that claimant suffered a non-occupational intervening injury to his right ankle which prompted the need for medical treatment. Such an intervening injury is not compensable.[7] Consequently, the ALJ's Order For Medical Treatment is modified to reflect such medical treatment does not include claimant's right ankle injury.

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[6] K.S.A. 2003 Supp. 44-508(g).

[7] *Stockman v. Goodyear Tire & Rubber Co.,* 211 Kan. 260, 505 P.2d 697 (1973).

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 12, 2004, is affirmed with respect to the February 10, 2004 accidental back injury and modified to reflect claimant did not suffer work-related accidental injury to his right ankle on February 11, 2004.

IT IS SO ORDERED.

Dated this _____ day of July 2004.

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Patrick M. Salsbury, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director